

SERVED: November 26, 2008

NTSB Order No. EA-5419

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 25<sup>th</sup> day of November, 2008

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ROBERT A. STURGELL,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-18006
v.	)	
	)	
ALLEN WAYNE LACKEY,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued March 5, 2008.<sup>1</sup> By that decision, the law judge affirmed the Administrator's complaint and ordered a 70-day suspension of

<sup>1</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

respondent's commercial pilot certificate, based on violations of 14 C.F.R. §§ 91.141,<sup>2</sup> 91.103,<sup>3</sup> and 91.13(a).<sup>4</sup> We deny respondent's appeal.

The Administrator issued the suspension order, which became the complaint in this case, on March 9, 2007. The complaint alleged that respondent operated a Bell 206B helicopter on April 21, 2006, as pilot-in-command on a passenger-carrying visual flight rules (VFR) flight from Napa County Airport in Napa, California, to San Francisco International Airport. The complaint further alleged that a NOTAM was in effect on April 21, 2006, that prohibited or restricted flight within a 30-nautical-mile radius within an area of San Jose, California, and that respondent, while transiting to San Francisco, operated the aircraft within the area that the NOTAM restricted. The complaint stated that respondent operated the aircraft without authorization within the area that the NOTAM covered, and that respondent was not familiar with the NOTAM prior to his

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<sup>2</sup> Section 91.141 provides that, "[n]o person may operate an aircraft over or in the vicinity of any area to be visited or traveled by the President, the Vice President, or other public figures contrary to the restrictions established by the Administrator and published in a Notice to Airmen (NOTAM)."

<sup>3</sup> Section 91.103 requires each pilot-in-command to become familiar with all available information concerning a flight before commencing the flight.

<sup>4</sup> Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

operation within the area. As a result, the complaint charged respondent with violations of the regulations listed above, and alleged that respondent's conduct was therefore careless or reckless. The complaint ordered a suspension period of 90 days.

At the hearing, the Administrator provided the testimony of Mr. Mitchell Peter, who is a supervisory traffic management coordinator at Northern California Terminal Radar Approach Control (TRACON) in Sacramento. Tr. at 14-15. Mr. Peter stated that he was on duty on April 21, 2006, and was responsible for monitoring the temporary flight restricted (TFR) area that the aforementioned NOTAM covered. Tr. at 15-16. Mr. Peter testified that he monitored the TFR by setting up a scope within inner and outer rings that indicated the TFR. Tr. at 16. Mr. Peter stated that, on April 21, 2006, he observed respondent's aircraft northwest of Oakland Airport, heading south toward San Francisco International Airport, and that respondent's aircraft penetrated the TFR. Tr. at 17. Mr. Peter stated that he called the San Francisco Air Traffic Control (ATC) tower, and inquired as to whether personnel at the tower were in contact with respondent. Id. Mr. Peter testified that personnel at the tower told him that they were communicating with respondent, and were attempting to provide respondent with a discrete code for respondent to squawk. Id. Mr. Peter stated that he then observed respondent squawking the code before

respondent landed at San Francisco. Id. Mr. Peter estimated that respondent proceeded approximately 4 to 5 miles inside the TFR before landing. Tr. at 18.

The Administrator called Mr. Donald Kirby, the FAA Air Traffic District Manager at Northern California TRACON, to testify. Tr. at 28. Mr. Kirby stated that he collected a variety of information and records to determine whether respondent had impermissibly entered the TFR. Tr. at 30. Mr. Kirby described the ATC plot that the Administrator produced, which depicts a track of respondent's aircraft in relation to the San Francisco Bay Bridge. Tr. at 37-40; Exh. C-1. Mr. Kirby also described a map of Northern California with circles indicating 30- and 10-mile rings encircling the TFR. Tr. at 47-48; Exh. C-2. Mr. Kirby stated that he determined that respondent had encroached into the TFR because respondent was south of the Bay Bridge. Tr. at 53.

The Administrator also called Mr. Michael Garr, a certified professional controller at the San Francisco ATC tower, to testify. Tr. at 81-82. Mr. Garr stated that he was on duty in the local control position on April 21, 2006, and that he heard respondent request a Hunters Point Arrival north of the Bay Bridge. Tr. at 83. Mr. Garr observed respondent's aircraft in the TFR using his radar scope, and that respondent's aircraft was squawking a non-discrete code. Tr. at 87. Mr. Garr stated

that his scope encompassed the entire TFR area, and that he observed respondent "in the vicinity of the Bay Bridge." Tr. at 88.

The Administrator's counsel concluded the Administrator's case-in-chief by calling Aviation Safety Inspector Ray Murphy to testify. Tr. at 95. Inspector Murphy stated that he had retired, but was formerly an aviation safety inspector at the Oakland Flight Standards District Office (FSDO). Tr. at 96. Inspector Murphy stated that he investigated the April 21, 2006 incident, and collected ATC recordings during his investigation. Tr. at 97-98. Inspector Murphy stated that, after concluding his investigation, he determined that respondent had entered the TFR without authorization, and that respondent did not know of the NOTAM in effect on April 21, 2006. Tr. at 111-12.

In response to the Administrator's case, respondent testified on his own behalf. Respondent stated that he is the owner of Wine Country Helicopters in Napa Valley, and operated a Bell helicopter departing from Napa County Airport on April 21, 2006. Tr. at 118. Respondent testified that he was aware of the NOTAM at issue approximately 2 weeks prior to April 21, and that he made preparations with the chief pilot from Bridgeford Flying Services to comply with the NOTAM. Tr. at 119. Respondent stated that such preparations included mapping the TFR on a terminal chart, on which respondent charted the edge of

the TFR as being 2.5 to 3 miles south of the Bay Bridge. Tr. at 120. Respondent stated that, on the day at issue, he received a call asking him for a flight to San Francisco, and that he called the Oakland Flight Service Station (Oakland FSS) in an attempt to file a flight plan. Tr. at 121. Respondent stated that he called Oakland FSS three times, but that the phone line was busy each time. Tr. at 121-22. Respondent testified that he then took off and headed directly to the Bay Bridge, and that, while en route, he attempted to call Oakland FSS again on frequency 122.1, but could not reach anyone at Oakland FSS. Tr. at 123. Respondent then stated that he decided to call the San Francisco ATC tower once he was approximately 1 to 2 miles north of the Bay Bridge, and that the tower instructed him to call Oakland FSS on frequency 122.1. Tr. at 123-24. Respondent testified that he was able to reach Oakland FSS on frequency 122.5, and that he received a code to squawk and was able to file his flight plan, while he was flying in a circular pattern approximately 1 to 1.5 miles south of the Bay Bridge. Tr. at 125. Respondent then requested and received a Hunters Point arrival, and landed his aircraft. Tr. at 125-26.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he found that the evidence established that respondent had penetrated the TFR without first filing a flight plan and obtaining a discrete code. Initial

Decision at 159. The law judge also determined that the evidence indicated that respondent was not aware of the existence of the NOTAM at the time of his April 21, 2006 flight. Id. at 160. In his decision, the law judge described the evidence at length, and specifically stated that the radar data and tracks contained in Exhibit C-1 were entitled to substantial weight and comported with other evidence in the record, and that Exhibit C-1 was probative in proving the Administrator's case. Id. at 151. The law judge determined that the Administrator's witnesses who observed respondent's alleged entry into the TFR on April 21, 2006, were credible. Id. at 148, 152, 154. The law judge also stated that he observed some inconsistencies in respondent's testimony. Id. at 156-57. Based on the evidence, the law judge determined that respondent violated §§ 91.141, 91.103, and 91.13, as alleged, but reduced the suspension period from 90 days to 70 days. Id. at 160-62.

On appeal, respondent argues that the law judge erred in admitting Exhibits C-1 and C-2 into evidence, that the evidence did not establish that respondent had violated the NOTAM, and that the law judge acted as an advocate for the Administrator at the hearing. In particular, respondent contends that the law judge admitted Exhibit C-1 in the absence of a proper foundation for the exhibit, and that the law judge should not have admitted Exhibit C-2 into evidence because the Administrator had not

produced the exhibit prior to the hearing, in violation of the law judge's pretrial order. Respondent also argues that the law judge erred in his review of the evidence, because the Administrator did not establish that the radar equipment on which the Administrator relied was accurate, and because the Administrator's witnesses could not answer specific questions about the exact boundaries of the TFR. Finally, respondent argues that the law judge assisted the Administrator's counsel in questioning some of the witnesses, and should not have required respondent's counsel to articulate the reasoning behind his objections. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.<sup>5</sup>

We have long held that law judges have significant discretion in overseeing administrative hearings and admitting evidence into the record. Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). Moreover, we will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001). When resolving issues involving the admission

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<sup>5</sup> We note that the Administrator does not contest the law judge's reduction in sanction.

of evidence, the Board is not bound by the Federal Rules of Evidence, but considers them to be "non-binding guidance."

Administrator v. Ferguson, NTSB Order No. EA-5360 at 10 (2008) (citing Petition of Cary A. Neihans, NTSB Order No. EA-5166 at 9 n.9 (2005)). In this regard, the Board is not bound by evidentiary or procedural rules that apply in other courts. Furthermore, the Board is aware of the wide latitude that the Administrative Procedure Act provides agencies concerning the admissibility of evidence at administrative hearings. 5 U.S.C. § 556(d) (stating that, "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence").

We have carefully reviewed the record and determined that the law judge did not err in allowing Exhibits C-1 and C-2 into evidence. Mr. Kirby certified that the radar plots in Exhibit C-1 were derived from computer recordings, and indicated that he was familiar with the production of such plots, even though he did not personally prepare the radar plots. Tr. at 69. We find that respondent's argument concerning Exhibit C-1 is an argument concerning the weight of the exhibit, rather than its admissibility, given the Administrative Procedure Act's provision concerning the admissibility of evidence. Overall, respondent has not shown that the law judge abused his

discretion by allowing Exhibit C-1 into evidence. We also find that the law judge did not err in admitting Exhibit C-2. The law judge determined that Exhibit C-2 was an enlarged, color version of a map that Exhibit C-3 contained. Tr. at 49-51. Respondent has not provided any evidence or reasoning that compels us to find that the law judge abused his discretion on the admissibility of Exhibit C-2.

We also find that the evidence supported the law judge's conclusion that respondent impermissibly entered the TFR and was unaware of the NOTAM, as alleged. Respondent's contention that the radar data was inaccurate is based on speculation and conjecture; respondent has not presented any evidence indicating that the radar equipment was unreliable. In addition, respondent's argument that the Administrator's witnesses could not recall whether the TFR was measured in statute or nautical miles is not helpful, as respondent does not show that the witnesses incorrectly assessed the boundaries of the TFR. Messrs. Peter, Kirby, and Garr all testified that they personally observed respondent south of the Bay Bridge, within the TFR. Tr. at 20, 53, 88. With regard to respondent's knowledge of the NOTAM, we also note that respondent only presented his own testimony to show that he knew of the NOTAM and prepared to comply with it; respondent did not provide the chart on which he testified that he outlined the boundaries of

the TFR, nor did respondent provide the testimony of the chief pilot of Bridgeford Flying Services, who respondent stated assisted him in outlining the boundaries. Overall, respondent does not provide us with reason to overturn the law judge's determination that he entered the TFR.

Finally, we note that respondent's argument that the law judge was biased is without merit. We have held that, in order to disqualify a law judge for bias or prejudice, "the bias or prejudice must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge has learned from his or her participation in the case."

Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985). We have long rejected contentions that a law judge decided a case or issued certain evidentiary rulings based on bias when the party alleging such bias presents nothing more than conjecture in support of the assertion. See, e.g., Administrator v. Nickl, NTSB Order No. EA-5287 at 7-8 (2007) (rejecting motion to disqualify law judge based on unsupported contention that law judge was biased); see also Administrator v. Wheeler, NTSB Order No. EA-5208 at 9 (2006). In this case, the record is replete with the law judge's admonishments to the Administrator's counsel and disagreement with the Administrator's counsel's objections. See, e.g., Tr. at 19, 21, 32, 34, 39, 67, 79, 95, 99-100, 102-104, 106-107, 115-16. In addition, the law judge's

inquiries concerning the bases for objections and for the admission of certain evidence were not for the benefit of the Administrator, but rather for the law judge to determine whether the evidence would be admissible. See, e.g., Tr. 101, 105. Overall, the law judge did not abuse his discretion in questioning the Administrator's counsel and witnesses.

Based on the record before us, we find that respondent violated 14 C.F.R. §§ 91.141, 91.103, and 91.13(a), and we affirm the law judge's decision.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's decision, including the reduction in sanction from 90 to 70 days, is affirmed; and
3. The 70-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>6</sup>

ROSENKER, Acting Chairman, and HERSMAN, HIGGINS, SUMWALT, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

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<sup>6</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

UNITED STATES OF AMERICA  
 NATIONAL TRANSPORTATION SAFETY BOARD  
 OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the matter of:	*	
	*	
ROBERT A. STURGELL,	*	
Acting Administrator,	*	
Federal Aviation Administration,	*	
	*	
Complainant,	*	Docket No.: SE-18006
	*	JUDGE GERAGHTY
v.	*	
	*	
ALLEN WAYNE LACKEY,	*	
	*	
Respondent.	*	
	*	

\* \* \* \* \*

Phillip Burton Building  
 450 Golden Gate Avenue  
 U.S. Tax Court  
 Courtroom 2-1350  
 San Francisco, California 94102

Wednesday,  
 March 5, 2008

The above-entitled matter came on for hearing,  
 pursuant to notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY,  
 Administrative Law Judge

## APPEARANCES:

On behalf of the Administrator:

LISA TOSCANO, ESQ.  
Federal Aviation Administration  
Office of the Regional Counsel  
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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board on the appeal of Allen Wayne Lackey, hereinafter Respondent, from an Order of Suspension, which seeks to suspend his Commercial Pilot's Certificate for a period of 90 days. The Order of Suspension, as provided by Board rules, serves herein as the Complaint, and was filed on behalf of the Acting Administrator, Federal Aviation Administration, herein the Complainant. The matter has been heard before this Judge, and as provided by the Board's rules, I am issuing a bench decision in the proceeding.

Pursuant to notice, this matter came on for trial on March 5, 2008, in San Francisco, California. The Complainant was represented by one of his Staff Counsel, Lisa Toscano, Esquire, of the Regional Counsel's Office, Western Pacific Region. Respondent was present at all times and was represented by his Counsel, Phillip L. Johnson, Esquire, of Los Angeles, California. Parties have been afforded the opportunity to offer evidence, to call, examine, and cross-examine witnesses, and to make argument in support of their respective positions.

In discussing the evidence, I limit myself to summary thereof, with comments, and evidence that I do not mention as been

1 reviewed by me, but is viewed as essentially corroborative or not  
2 materially affecting the outcome of the decision.

3 By pleading, it was agreed there was no dispute as to  
4 the allegations contained in numbered paragraphs 1, 2, 3, and 4 of  
5 the Complaint, and therefore the matters set forth in those  
6 enumerated paragraphs are taken as having been established for  
7 purposes of this decision.

8 As noted, the Complainant seeks a suspension of 90 days  
9 against the Respondent's Commercial Pilot's Certificate. That is  
10 predicated upon allegations that by reason of the Respondent's  
11 admitted flight of April 21, 2006, in a departure from Napa County  
12 to arrival in San Francisco International Airport, that he so  
13 operated his aircraft as to be in regulatory violation of  
14 provisions of Section 91.141 of the Federal Aviation Regulations,  
15 which prohibits any person from operating an aircraft over and in  
16 the vicinity of any area visited or traveled to by, in this case,  
17 the President of the United States.

18 Contrary to any restrictions established by the  
19 Administrator or published in a Notice to Airman, a NOTAM, also  
20 charges a violation of Section 91.103, which prohibits or states  
21 that a pilot in command shall, before beginning a flight, become  
22 familiar with all available information concerning the flight,  
23 which essentially prohibits flight without becoming so familiar,  
24 and lastly, Section 91.13, which prohibits operation of an  
25 aircraft in a careless or a reckless manner so as to endanger the

1 life or property of another.

2 The Complainant's case is made through the testimony of  
3 several witnesses and exhibits offered and received during the  
4 course of the proceeding, which included re-recording tapes of  
5 various voice communications between FAA facilities and the  
6 Respondent.

7 The first witness was Mr. Mitchell Peter, who is  
8 employed by the FAA. In the present position he is, as I  
9 understand, a Supervisory Traffic Management Coordinator with  
10 TRACON here in California. He is a Controller in the Air Force,  
11 and been with the FAA for about 25 years. On the date in question,  
12 April 21, 2006, he was on duty and was the Supervising Traffic  
13 Management Coordinator, monitoring the established Temporary  
14 Flight Restricted Area, also referred to herein as TFR, which was  
15 established in the Bay Area for purposes of a visit by the  
16 President of the United States. Those are part of the admitted  
17 allegations that I had reference to as to the establishment of the  
18 NOTAM, the designation, and the fact that it was a 30-nautical  
19 mile radius that included the San Francisco International Airport.

20 Mr. Peter stated that he was observing, in the  
21 performance of his duties, a scope, and that on the scope there  
22 was an inner and outer ring. The inner ring was, I believe, a 10-  
23 mile ring, and the outer ring definitely is the 30-nautical mile  
24 ring. These were used by him to designate and be able to monitor  
25 any traffic that might be entering the established TFR. He stated

1 that he observed an aircraft coming in with a 1200 code, that he  
2 called the San Francisco Tower and asked if they were talking to  
3 this particular aircraft, they said they were, they identified the  
4 aircraft as helicopter N62HF, which is the aircraft being operated  
5 by the Respondent on the date in question.

6           There was subsequently, according to Mr. Peter, his  
7 identification of the aircraft as being to the east side of the  
8 San Francisco Airport, and then observing it to come in and  
9 subsequently land at San Francisco International Airport. This  
10 was the only traffic target, according to the witness, that he  
11 observed at that occasion.

12           As to the location when this witness observed it, he  
13 indicated it was on a 350 degree radial, about 12 DME miles due  
14 north of the San Francisco Airport, and about four to five miles  
15 inside the TFR, and circling on the east side of the City of San  
16 Francisco. Exhibit C-1 is the purported track generated on an ATC  
17 plot, and there is a large, almost like a blot, which on  
18 Mr. Garr's testimony is inside the San Francisco scope range of 10  
19 nautical miles, which is, according to Mr. Peters, where he saw  
20 the aircraft in a circling or holding-type area, not a specific  
21 holding pattern, but at least circling in that area.

22           And on the Respondent's own testimony, he also indicated  
23 that while he was attempting to make contact with a Flight Service  
24 Station and obtain a clearance that he was circling about one,  
25 one-and-a-half miles south of the Bay Bridge, although he claimed

1 that was outside the TFR. So the testimony of Mr. Peter is  
2 consistent with both that of the Respondent, and the depiction on  
3 C-1, which places it, as I've indicated, according to Mr. Garr's  
4 undisputed testimony, within a 10-mile radar range from the San  
5 Francisco Airport.

6 On cross-examination, Mr. Peter indicated that the  
7 center of the TFR was Moffett Field, using off the VOR located  
8 down in the San Jose area. Specifically on cross, the witness  
9 stated the Bay Bridge was within the outer 30-nautical mile ring  
10 by approximately one to two miles. And I've already discussed the  
11 circling maneuver that he, on cross-examination, reiterated that  
12 he saw, and indicated it was more a circling-type maneuver than a  
13 specific holding pattern.

14 On cross-examination, he admitted that he was not aware  
15 of when checks were made on specific items of equipment that he  
16 was utilizing that day, the scope or the equipment that was used  
17 to generate the ATC plot, and the hard data that appears in the  
18 subsequent pages, which are five in number, that are attached as  
19 part of the face plate of C-1. However, Mr. Peter went on to say  
20 that, as far as he was concerned, looking at his video displays  
21 they were accurate, that he knew that because his experience was  
22 from using that equipment. I would observe here that questions  
23 may be raised as to the accuracy of the equipment by asking, "Do  
24 you know when the last check was'?"

25 But that is not sufficient to question the validity of

1 the data. The testimony here from the witnesses using it is that  
2 it was accurate, he knows that from experience, that he was  
3 currently using it. I also take into account that the depiction  
4 as to what appears on C-1 is consistent both with the oral  
5 testimony of the Complainant's witnesses and essentially with the  
6 testimony of the Respondent, particularly as to his circling-type  
7 maneuvers. So in my view, the data proffered as part of Exhibit  
8 C-1, and the testimony related thereto, is entitled to substantial  
9 weight, and I so assign it.

10           Mr. Donald Kirby also is employed by the Federal  
11 Aviation Administration. He's at the TRACON also. He has been  
12 with the Federal Aviation Administration 26 years, all of it in  
13 Air Traffic Control. He sponsored Exhibit C-1. Page 1 of the ATC  
14 plot, as he stated, was a track of the target overlaid on the  
15 scope depiction of San Francisco Bay Area, and his signature at  
16 the bottom was certified. There was testimony, with reference to  
17 various sections of the printout, on the subsequent pages behind  
18 the front page of C-1. One thing to be observed is that there is  
19 a shift to the right in the data, so that when one looks at the  
20 data under the actual heading, the data that appears under the  
21 heading at the top of the page is actually data to be shifted over  
22 one step. So for example, on page 3, at A-125, when one looks  
23 under Speed, SPD, it says 250, but actually the speed should be  
24 139, because there's a shift over to the side. So if you look at  
25 the speeds that are reflected, and take it down to the shift, it

1 does appear that the speeds recorded on the plot are all well  
2 within the performance capabilities of the helicopter which the  
3 Respondent was operating on the date in question.

4 Suffice to say that, based upon his discussion of the  
5 printout and C-1, that he stated he had determined that helicopter  
6 N62HF, the Respondent's aircraft, had entered the TFR without  
7 authorization, that it was clearly south of the 30-mile range  
8 marker and the Bay Bridge, and then was maneuvering prior to  
9 getting a discrete code from San Francisco Tower. And his  
10 testimony, therefore, is clearly placing the Respondent within the  
11 TFR.

12 On cross-examination, at first he indicated that the  
13 reference I just had to A-125 indicated an airspeed of 250 knots.  
14 However, as the testimony developed there was both a coast mode,  
15 when the radar was trying to distinguish between two different  
16 returns, between the squawk of 1200, the general code, and the  
17 discrete code, but also pointing out there was the shift, as  
18 depicted on A-127, a speed of 139 knots, and then on A-142 80  
19 knots. So these are all speeds that are well within the  
20 capability of an experienced helicopter pilot and the equipment  
21 itself.

22 I discuss his recall testimony here, on Mr. Peter when  
23 recalled, who indicated that on his review of C-1, compared to  
24 what he specifically, personally observed that day, that the data  
25 on C-1 was consistent with his personal observation. Secondly, as

1 to cross-examination, while he couldn't give an exact degree of  
2 heading for Respondent's aircraft, he was able to state that it  
3 was southbound. And if one looks at the data on C-1, if you look  
4 to the headings given, they are generally in, a 173 degree, 179  
5 degree heading so we are in the area of southbound aircraft.

6 Mr. Mike Garr is employed by the FAA. He is within Air  
7 Traffic Control; he's been with FAA 23 years. He was on duty in  
8 the San Francisco or the cab on the date in question. He was  
9 working the position of Local Control, and was responsible for  
10 both landing and departing aircraft out of San Francisco  
11 International Airport. He stated that he had contact with  
12 aircraft N62HF when he got a request for arrival from the pilot of  
13 that aircraft indicating that he was north of the Bay Bridge.

14 C-4 is a tape recording of the communications being held  
15 between Mr. Garr and the Respondent and, according to the  
16 testimony, could be heard on the tape when one listens to Tape 4.  
17 There was an inquiry of Mr. Garr as to the filing of a flight plan  
18 and the existence of the TFR, and as to whether any flight plan  
19 had been filed and needed to be filed, according to Mr. Garr, as  
20 I've already indicated, because there was, in fact, a NOTAM  
21 establishing a TFR on that day in question for the San Francisco  
22 Airport area.

23 Mr. Garr stated that also, in the position of ATC, the  
24 San Francisco Tower would have had prior notice if the Respondent  
25 had filed a flight plan prior to his entering the San Francisco

1 area or making the contact with Mr. Garr in the San Francisco  
2 Tower. Mr. Garr stated that he observed the Respondent's  
3 helicopter on his, Mr. Garr's, scope. There was a limited data  
4 return, with just altitude -- that is, there was no discrete code,  
5 it was on the 1200 code. He stated that he observed the aircraft  
6 to be northwest in the vicinity of the Bay Bridge, and the  
7 location that he observed put the aircraft within the TFR.

8           On cross-examination, he again reiterated the aircraft  
9 that he observed N62HF, was, on his contact, within the TFR, and  
10 that on that particular day in question his entire radar display  
11 and scope was set up to display everything entirely within the  
12 boundaries of the TFR. He stated that he couldn't give the exact  
13 range, just the vicinities, but that he observed the aircraft  
14 definitely to be within the TFR because anything that appeared on  
15 his scope, because of the settings that he was then utilizing,  
16 would have placed any aircraft, any return, within the boundaries  
17 of the TFR.

18           Mr. Murphy has retired from the Federal Aviation  
19 Administration, from which he has escaped. However, he had a long  
20 association with that Agency, from September 1987 to 2007, and  
21 prior to that with Flight Service Station in 1984, Oakland Center  
22 in 1983, and holds numerous certificates and ratings, in excess of  
23 8,000 hours. He was the Investigating Aviation Inspector for this  
24 incident, and in the course of that investigation contacted the  
25 Oakland Flight Service Station and gathered deviation reports,

1 tape recordings, and witness statements.

2 He sponsored C-5; C-5 is a tape of the communications  
3 with Flight Service Station. After, in sequence of events, the  
4 Respondent had contacted the San Francisco Tower, and then told by  
5 the Tower that, you know, We don't have a flight plan, there's a  
6 TFR and we need a flight plan, and listening to the tape on C-5,  
7 it is clear to me that the Respondent was not aware that there was  
8 a TFR, because he indicates that, "I guess if there's a TFR I've  
9 got to file a flight plan." There's no indication that, "I tried  
10 to file,' or anything else, it's just that, "I guess I have to."  
11 And at that time the aircraft is south of the Bay Bridge, and that,  
12 again, is consistent with the prior witness's testimony and the  
13 depiction on C-1. And listening to the tape, it is also clear  
14 that the Tower requests the Respondent, after he lands at San  
15 Francisco Airport, and prior to departure, that he contact San  
16 Francisco Tower on a landline, not Northern Cal, or NORCAL, as  
17 some of them are saying it.

18 Mr. Murphy also testified that his review of the plot on  
19 C-1 is consistent with what he heard on the radio transmission and  
20 what he had garnered in his investigation, and therefore opined  
21 that the Respondent had entered the TFR without authorization, and  
22 that from the tenor of the communications and the sequence thereof,  
23 that the Respondent did not know about the existence of a NOTAM,  
24 particularly since no flight plan had been filed prior to the  
25 entry, and he had entered this restricted airspace without

1 authorization or clearance.

2           The Respondent testified on his own behalf. He is the  
3 owner and single pilot operator of the Wine Country Helicopters,  
4 which is based at Napa, California. He operates aircraft N62HF,  
5 and was admittedly flying the aircraft in this incident. On his  
6 testimony, he stated prior to the flight he was familiar with the  
7 existence of the NOTAM because he has a subscription service and  
8 was aware of it two weeks before this particular flight. However,  
9 there's some inconsistency here because it appears on his  
10 testimony also that this was a spur-of-the-moment flight, that  
11 someone came in the late afternoon, three-something, apparently a  
12 medical emergency of some type, so this couldn't have been a  
13 planned flight from several days before. The person came in and  
14 wanted to go to San Francisco for a medical emergency of some type.

15           But in any event, the witness, Mr. Lackey, on his own  
16 behalf, states that he was aware of the NOTAM two weeks before the  
17 flight, and that, I guess, in possible preparation for something  
18 that might come up, that he and another individual had taken a  
19 terminal area chart and did chart out a 30-mile radius, and that  
20 according to what he and this other individual had charted out,  
21 the 30-mile radius arc, an arc one-and-half to two miles from the  
22 Bay Bridge.

23           As I've already stated, he got a call for a flight to  
24 San Francisco, and on his testimony he indicates that he called  
25 Oakland Flight Service Station three times attempting to get

1 through, was not able to on the landline, went out and serviced  
2 the helicopter, and then went back inside his facilities and made  
3 a fourth call, and again was not able to get through. He  
4 therefore, on his testimony, decided to air file, or file en route.

5           He took off from Napa and proceeded direct towards the  
6 Bay Bridge, and somewhere in the vicinity of Mare Island he  
7 attempted to contact Oakland Flight Service Station on 123.1, and  
8 was unable to make any contact. He indicated he tried several  
9 times and then decided he would call San Francisco Tower with the  
10 contact of Mr. Garr that I've already had reference to.

11           He states that at the time that he was talking with San  
12 Francisco Tower, and, I take it, also attempting his contacts with  
13 Flight Service Station, that he was one-and-a-half miles north of  
14 the Bay Bridge. He states that San Francisco Tower first gave him  
15 contact of 122.1, having tried that there was no response from  
16 Flight Service, and that he spontaneously went over to 122.5, and  
17 was then able to contact Flight Service Station, and that at this  
18 time he was about one, one-and-a-half miles south of Bay Bridge  
19 while flying in circles. However, according to his calculations,  
20 he was still outside the confines of the TFR.

21           And as I've pointed out, his testimony here is  
22 consistent with the depiction on C-1 and the testimony of  
23 Mr. Peter, which indicates the darkened block inside the 10-mile  
24 range, and according to Mr. Garr's testimony, where the Respondent  
25 is circling, and well within the 30-nautical mile range as

1 depicted on C-1 by the Complainant's witnesses.

2 In rebuttal, Mr. Garr was recalled by the Complainant,  
3 and he stated that on the initial contact from the Respondent that  
4 he brought information that he had. He was asked by Mr. Garr if  
5 he had filed a flight plan for the TFR, and that the response that  
6 Mr. Garr got was, no, he had not. And, of course, that is also  
7 consistent that there was no flight plan filed up until that point.  
8 Mr. Garr stated that, based upon the conversation that he had over  
9 the radio with the Respondent, that he was of the impression that  
10 the Respondent was not aware of the existence of the TFR.

11 On cross-examination, again Mr. Garr denied that he had  
12 ever informed the Respondent to call NORCAL, rather that the  
13 instruction to the Respondent was for him to call on a landline  
14 and to contact the San Francisco Tower. That, to me, is the  
15 pertinent evidence in the case. Of course, the first issue here  
16 is whether or not the Respondent was actually within the TFR,  
17 before we even get to the flight plan, because if he wasn't in the  
18 TFR, the flight plan filing falls away.

19 On the testimony in front of me, I am willing to credit  
20 that the Respondent, on his testimony, because there's no  
21 disputing that, he attempted to call Flight Service Station so  
22 that he could take this unexpected passenger to San Francisco  
23 Airport, and wasn't able to get through on the landline. However,  
24 attempts to file a flight plan, or attempts to obtain a clearance,  
25 is not the equivalent of obtaining a clearance or filing a flight

1 plan. One cannot enter controlled airspace without a clearance.  
2 The fact that you have attempted to get a clearance does not  
3 equate with a clearance. If you can't get through, you have to  
4 remain outside the controlled airspace until you have the  
5 authorization to enter it, whether it's Class A airspace, Class B  
6 airspace. If you need a clearance to get in there or a TFR, you  
7 have to have it before you get in there. The fact that you may  
8 have tried six times, you're holding outside the airspace, and  
9 there's a lot of chatter on the air, you're going to have to hold  
10 out there until you can get through, because you can't enter until  
11 you get through and they authorize you.

12           So the fact that the Respondent may have -- and I'm  
13 willing to say that I accept that he did attempt to contact these  
14 people, the fact is he didn't. The evidence to me clearly  
15 indicates that the Respondent never had a flight plan filed or a  
16 clearance until such time as he was actually in contact with San  
17 Francisco Tower and was given the frequencies and air filed in the  
18 air.

19           As to the existence of the TFR, as admitted, it is an  
20 outer ring of 30 nautical miles, and on the testimony of Mr. Garr,  
21 and Mr. Peter's testimony also, the scope, the 10-mile ring, the  
22 circling there while the clearance was being obtained, is well  
23 within the TFR radius, the track, clearly on a southbound heading  
24 and 170 degree areas, put this aircraft proceeding southbound to  
25 San Francisco inside the TFR. On the preponderance of the

1 evidence in front of me, the Respondent did operate his aircraft  
2 within the 30 nautical mile outer ring of the established TFR. He  
3 did not have a clearance to be in the TFR.

4 I find, therefore, that on the preponderance of the  
5 evidence in front of me, the Respondent did in fact operate in  
6 regulatory violation of Section 91.141 of the Federal Aviation  
7 Regulations, and that he did operate contrary to the restrictions  
8 established in the published NOTAM in effect on that particular  
9 date for the San Francisco Bay Area.

10 As to whether or not he made himself available with all  
11 information concerning this flight, as required by Section 91.103  
12 of the Regulations, this really stems from inferences. If the  
13 Respondent knew there was a TFR in existence, and actually did  
14 know there was a 30-nautical mile outer ring, it is hard to  
15 believe that a commercial pilot would have deliberately penetrated  
16 that ring without first having received a clearance, or filing a  
17 flight plan airborne, holding somewhere until he actually could  
18 file the flight plan. The only holding takes place well within  
19 the TFR, after contact with San Francisco Tower, and well within  
20 the TFR.

21 Also, listening to the communication reflected on the  
22 tape, it is my conclusion that the Respondent, by reason of his  
23 expressions to the controllers, that he was not aware of the  
24 existence of the NOTAM or the fact that he needed to file a flight  
25 plan and get clearance to come into San Francisco on this

1 particular day. I, therefore, find that it is established, on the  
2 preponderance of the evidence, a violation of 91.103 of the  
3 Regulations.

4           With respect to a charge violation of 91.13 of the  
5 Regulations, I view it in the circumstances of this case as  
6 essentially a residual violation. The Board precedent is that  
7 once it is established in a case that there does exist operational  
8 violations, as is the instance here, the violation of Section  
9 91.13 follows as a lesser included offense or a residual violation,  
10 and I view it that way. And as such, in accordance with Board  
11 precedent, the residual violation, or lesser included violation,  
12 does not in any way add to the sanction to be imposed in that  
13 particular case.

14           Turning then to the sanction sought by the Administrator,  
15 I am aware that deference is to be shown to the Administrator's  
16 choice of sanction. However, there have been charges of three  
17 violations and the request for 90 days. In my view, listening to  
18 the testimony and looking at the violations that are established  
19 as operational violations, the more serious of these is the 91.141  
20 violation, that is operation contrary to the NOTAM, and that, to  
21 me, in my view, is worth 40 days. The violation of not making  
22 himself familiar with available information concerning the flight,  
23 in Board cases dealing specifically with that type of violation,  
24 the general sanction sought by the Administrator is 30 days. And  
25 as I've indicated the 91.13 violation, while existing, does not

1 add to the sanction, in my view, and therefore I've reduced the  
2 sanction in this case from a period of 90 days to 70 days.

3 ORDER

4 IT IS THEREFORE ADJUDGED AND ORDERED THAT:

5 (1) The Order of Suspension, the Complaint herein, be,  
6 and the same hereby is, modified to provide for a period of  
7 suspension of 70 days, rather than 90 days.

8 (2) That the Order of Suspension, the Complaint herein,  
9 as herein modified, be, and the same hereby is, affirmed.

10 (3) That the Respondent's Commercial Pilot Certificate  
11 be, and the same hereby is, suspended for a period of 90 (sic)  
12 days.

13 Entered this 5th day of March 2008, at San Francisco,  
14 California.

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16 EDITED & DATED ON

17 March 28, 2008

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PATRICK G. GERAGHTY

Administrative Law Judge